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No. 399

In the Supreme Court of the United States

OCTOBER TERM, 1961

SHELL OIL COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	8
Conclusion	18

CITATIONS

Cases:

Barber Asphalt Paving Co. v. *St. Louis Cypress Co.*, 121 La. 152	14
Commissioner v. *Sunnen*, 333 U.S. 591	16
Cromwell v. *County of Sac*, 94 U.S. 351	17
First Iowa Hydro-Electric Cooperative v. *Federal Power Commission*, 328 U.S. 152	15
Leiter Minerals, Inc. v. *United States*, 352 U.S. 220	16
Louis Werner Sawmill Co. v. *O'Shee*, 111 La. 817	12–13
Phillips Petroleum Co. v. *Wisconsin*, 347 U.S. 672	3
Propper v. *Clark*, 337 U.S. 472	15
Stoll v. *Gottlieb*, 305 U.S. 165	16
Tacoma, City of v. *Taxpayers*, 357 U.S. 320	16

Statute and rules:

Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717, *et seq*	3
Section 4	3, 4
18 C.F.R. 154.91, *et seq*	3

Miscellaneous:

	Page
Comment, *Certainty of Promise in the Law of Sale*, 30 Tul. L. Rev. 568 (1956)	12
Hebert and Lazarus, *Some Problems Regarding Price in the Louisiana Law of Sales*, 4 La. L. Rev. 378 (1942)	11–12
Smith, *Civil Code and Related Subjects (Particular Contracts)*, 16 La. L. Rev. 242 (1956)	12

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OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App. A–1—A–7) is reported at 292 F. 2d 149. The orders of the Federal Power Commission (R. 133–145, 153–161) are reported at 18 F.P.C. 617 and 19 F.P.C. 74.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1961 (Pet. App. A–8). The petition for a writ of certiorari was filed on September 12, 1961.

[1] Also relevant here are the prior opinion of the court of appeals and this Court's opinion reversing that court's judgment and remanding the case for decision on certain questions. These are reported at 263 F. 2d 223 and 363 U.S. 263, respectively.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the court below correctly held that, in the respects here relevant, Louisiana law does not differ from general contract law.

2. Whether, in the circumstances here presented, this Court should direct the suspension of this proceeding to await a decision by the Louisiana courts in the state action instituted by petitioner after the adverse judgment of the court of appeals.

STATEMENT

The petition in this case seeks review of the judgment of the Court of Appeals for the Third Circuit adjudicating certain questions remanded to it by this Court in *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263. The ultimate issue concerns the interpretation of a favored-nation clause of a natural gas sales contract dated May 1, 1951, between Texas Gas Transmission Corporation and Shell Oil Company (Shell contract)[2] and the effect under that clause of a price redetermination agreed to by Texas Gas with The Atlantic Refining Company in 1954 pursuant to a 25-year contract which had been executed on September 1, 1943 (Atlantic contract).[3] The back-

[2] The Shell contract was originally with Texas Gas' wholly-owned subsidiary, Louisiana Natural Gas Corporation. The corporations merged in June 1955 (R. 134).

[3] The Atlantic contract had initially been between Atlantic and the Defense Plant Corporation, an agency of the Federal

ground of the present controversy and the relevant facts are as follows:

1. After this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, holding sales of natural gas in interstate commerce by independent producers to be subject to the Natural Gas Act (52 Stat. 821, 15 U.S.C. 717, *et seq.*), the Commission directed such producers to file rate schedules showing their rates in effect on June 7, 1954, the date of that decision (18 C.F.R. 154.91, *et seq.*); in addition, all changes thereafter made were to be subject to the Commission's regulations and filing procedures under Section 4 of the Act.

In November 1954, Shell duly filed, as part of its rate schedule, its contract with Texas Gas. Pursuant to a requirement of the Commission's regulations (18 CFR 154.92) that it attach "a statement showing estimated sales and billing for the first month of service," Shell attached a copy of the credit statement for that month rendered by Texas Gas (which metered the gas) showing the rate actually being paid on that date was 8.997 cents per Mcf (thousand cubic feet) (R. 81). Shell also attached, however, a "sample" billing statement which purported to show that the correct rate was 12.5 cents (R. 80). The Commission, in January 1955, notified Shell that it would not accept the filing until an explanation of the effective rate was provided (R. 161–162).

Government, but Texas Gas (through its subsequently-merged subsidiary) had acquired all the latter's rights on May 11, 1949 (R. 125).

Shell took no action until February 1957, when, in filing a new rate schedule prospectively changing its rate for the sale to 16.75 cents,[4] it again claimed that its effective rate on June 7, 1954, was 12.5 cents. This claim was based on the ground that the February 22, 1954, Atlantic price redetermination setting that price (*i.e.*, 12.5 cents per Mcf) for gas delivered by Atlantic to Texas Gas under the 1943 Atlantic contract had triggered the favored-nation clause of its contract with Texas Gas (R. 116). The Commission directed a hearing to determine the validity of Shell's claim with regard to the rate in effect on June 7, 1954 (R. 116–117).

2. The favored-nation clause of the Shell contract provides (R. 63–64):

> If at any time after December 31, 1951, Buyer [Texas Gas] shall enter into a contract providing for the purchase by it of gas produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller [Shell] of such fact, and if the price per one thousand (1,000) cubic feet at any time pay-

[4] The Commission suspended the proposed 16.75-cent-rate, pending a determination of its reasonableness, in a proceeding which is still pending before the Commission. That rate (based upon the triggering of the favored-nation clause in Shell's contract with Texas Gas by another purchase of gas by Texas Gas admittedly made under a new contract within the meaning of the favored-nation clause) went into effect after the expiration of the five-month suspension period, subject to the Commission's power to order refunds and rate reductions if the increased rate is ultimately found to have been unjustified. See Section 4(e) of the Act, 15 U.S.C. 717c(e).

able under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. * * *

At the time the Shell contract was made, Texas Gas was also buying gas from Atlantic under the Atlantic contract. Condition III of that contract specifies the price for gas delivered during the first five years of its 25-year term, and then goes on to provide (R. 87–88):

* * * * *

(b) At the end of the first five-year period, Buyer and Seller are to reach an agreement as to the price for gas sold and delivered under this contract during the second five-year period. The price to be paid during such second five-year period is to be agreed upon at the beginning of such period after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana.

(c) During succeeding five-year periods, prices to be paid will be determined at the beginning of each period in the same manner as provided for in paragraph (b) above.

(d) In the event that the parties are unable to agree upon the price to be paid for gas after the first five-year period, in accordance with the arrangements set forth in paragraphs (b) and (c) above, such determination shall be submitted to arbitration in accordance with Condition XII.

Condition XII of the Atlantic contract provides (R. 93–94):

> In case the parties hereto shall be unable to agree on any question or dispute arising under this contract, such question or dispute shall be referred for settlement to three arbitrators, one appointed by Seller, one appointed by Buyer, and the third appointed by the two others so chosen. The party desiring such arbitration shall notify the other and in such notice shall name an arbitrator, the arbitrator to be appointed by the other party shall be named within ten (10) days after receipt of such notice of arbitration, and an additional arbitrator shall, within ten (10) days of the appointment of the second arbitrator, be selected by the two (2) arbitrators theretofore appointed, but if one of said parties shall have failed to appoint an arbitrator within the time provided herein, it is expressly understood and agreed that the sole arbitrator shall arbitrate the question alone. If arbitrator shall have been appointed by the respective parties and shall have failed to select the third arbitrator within the above stated time, the third arbitrator shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of the said parties to the arbitration.
>
> The matter in question or dispute shall be submitted in writing to the arbitrators immediately upon the completion of their appointment, and the parties shall do all things necessary to make proper submission thereof according to the character of the question or dispute involved, or as required by the arbi-

> trators. The decision in writing signed by a majority of the arbitrators shall be final and conclusive with respect to the matter submitted and the parties hereto agree to accept and abide by the same. * * *

The 1954 Atlantic price redetermination, as well as that made in 1948, was arrived at by agreement under Condition III of the Atlantic contract and without resort to arbitration machinery set out in Condition XIII.

3. After hearings, the Commission ruled that the 1954 Atlantic price redetermination had not triggered the Shell favored-nation clause, and accordingly concluded that Shell's effective rate in 1954 for its sale of gas to Texas Gas was unchanged from 8.997 cents which Texas Gas had been paying (R. 133–145). On review sought by Shell, the court of appeals, in its initial decision, set the Commission's order aside. 263 F. 2d 223.

The court assumed for the purposes of that decision that the Atlantic contract imposed an enforceable obligation for fixing prices for the subsequent five-year periods (263 F. 2d at 226). Nevertheless, the court held that the Shell favored-nation clause was intended to be triggered by price redeterminations pursuant to earlier (*i.e.*, pre-1952) gas purchase contracts as well as by prices fixed in entirely new contracts entered into thereafter. Accordingly, the court of appeals did not reach Shell's further argument that the 1954 Atlantic price redetermination necessarily involved the "enter[ing] into a contract" within the Shell favored-nation clause because the

provisions for price redetermination of the Atlantic contract were not, as Shell argued, legally enforceable.

In reversing the court of appeals, this Court made the same assumption as to the enforceability of the Atlantic contract. 363 U.S. at 271, fn. 8. Noting Shell's further argument based on the alleged non-enforceability of the Atlantic contract, the Court remanded this question for determination by the court of appeals. In addition, the Court adverted to the Commission's contention that, in any event, the question of enforceability was immaterial, and remanded this issue as well to the court of appeals. 363 U.S. at 276–277.

On remand, the court of appeals affirmed the Commission's order (Pet. App. A–1—A–7). While holding that the enforceability issue was material (Pet. App. A–2), the court ruled that the Atlantic contract was enforceable (Pet. App. A–5—A–7). With reference to Shell's contention that Louisiana law governed the enforceability issue, the court commented (Pet. App. A–7):

> * * * under our conception of the controverted document, Louisiana law, in this instance at least, does not differ from general contract doctrine. Therefore, abstract discussion of whether Louisiana law controls the enforceability of the Atlantic pact is not called for. * * *

ARGUMENT

Petitioner Shell does not question the principal holding of the court below, *i.e.*, that the 1943 Atlantic contract was enforceable under general contract law, so that the 1954 price redetermination was made in

accordance with the 1943 agreement and hence does not involve the "enter[ing] into of a [new] contract" within the Shell favored-nation clause. Instead, Shell urges that, under what it asserts to be applicable principles of conflict of laws, the enforceability of the 1943 Atlantic contract is controlled by Louisiana law rather than general contract law, and that Louisiana law, because of the alleged peculiarities of its Civil Code provisions, dictate a different result. The court below, however, found it unnecessary to reach this conflict of laws question since it concluded that in all material respects Louisiana law does not differ from general contract principles. There is, moreover, no reason to grant Shell's request to suspend these proceedings pending decision by the Louisiana courts in the action recently instituted by Shell. Shell's position on both matters is predicated upon alleged peculiarities of Louisiana law, and the questions are not of general importance.[5] There is no occasion for further review by this Court.

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[5] In an attempt to show general importance, Shell refers to the "thousands of independent producer gas sales contracts [which] have been filed as 'rate schedules' with the Federal Power Commission" (Pet. 9–10), and asserts that "* * * the recurrence of such questions before the Commission was urged by respondents in support of their successful petitions for writs of certiorari previously filed in this very case" (Pet. 10).

The questions earlier brought by the Commission to this Court were radically different and the Commission's petition expressly noted the lack of any general importance with regard to the enforceability question. See Petition for Writ of Certiorari in No. 170, October Term, 1959, p. 17, fn. 15. Indeed, at that time, when the questions presented were patently of far broader scope, Shell urged (Brief in Opposition in Nos. 167,

1. According to Shell, the issue which it "primarily * * * ask[s] this Court to review" is a question of conflict of laws—"whether federal substantive law or State law [of Louisiana] should govern" in the circumstances said to be involved here (Pet. 11). The judgment below, however, is based on general contract principles, not on a separate rule of federal substantive law (Pet. App. A–7). Shell's attempt to amalgamate the two by stating that "general contract doctrine" is merely a characterization adopted by the court below for federal substantive law (see Pet. 2, 11) is wholly unsupported. Moreover, and more significantly, the court below clearly did not decide any conflict of laws question, and none is presented by the case. In the view that in this instance Louisiana law did not differ from general contract doctrine, the court of appeals expressly held, as Shell reluctantly recognizes (Pet. 11), that there was no need for it to consider or pass upon the choice of law problems which Shell undertook to pose (Pet. App. A–7; *supra*, p. 8).

2. The content of the Louisiana law on the narrow point at issue is plainly not a question appropriate for review here. In any event, the conclusion of the court of appeals that Louisiana law on the point does not differ from general contract doctrine is not based on a misinterpretation of Louisiana law. In the relevant re-

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170, October Term, 1959, pp. 17–18, see also, pp. 11–14; cf. 363 U.S. at 268, 270):

"* * * [T]his is not a case of general importance but, in reality, is nothing more than a contract dispute between Shell and Texas Gas involving a privately negotiated contract in a unique situation * * *."

spects, the law of that state is the same as general contract doctrine, despite the differences in terminology.[6]

Shell argues that, despite the conceded enforceability of the Atlantic arbitration provision (see Pet. App. A–5), that contract, under Louisiana law, was not "enforceable for any of its five-year periods after the first, because there was no fixed and determined price; hence the contract was subject to a 'suspensive' condition * * * and was of no effect whatever, for any purpose, until the price was actually fixed. When that was accomplished by virtue of the February 17, 1954 agreement, a contractual obligation to sell and to buy gas was created" (Pet. 12–13). In so urging, Shell confuses a sale (*i.e.*, present transfer of title with its concomitant risks) with a contract to sell (*i.e.*, present agreement for future transfer of title), a distinction made in Louisiana as in common law jurisdictions. Thus, while under Louisiana law there may be no present enforceable sale in the absence of a fixed and determined price, contracts to sell containing arbitration provisions (such as that in the Atlantic contract) are enforceable in Louisiana as elsewhere and damages may be recovered for breach thereof. As stated in Hebert and Lazarus, *Some Problems Regarding Price in the Louisiana Law of Sales*, 4 La. L. Rev. 378 (1942), an article upon which Shell relies heavily (Pet. 19–21) (4 La. L. Rev. at 400–401):

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[6] Significantly, Shell, while contending for a contrary substantive ruling, urged in the court below that the Louisiana law was not dissimilar from general or federal law. See, *e.g.*, Reply Brief for Petitioner filed on remand in C.A. 3, No. 12568, pp. 11, 12, 15, 18.

> * * * It is true that one of the parties may refuse to comply with his obligation of appointing the estimator and thus has it within his power to nullify the agreement; but the contract is nonetheless binding, even though it cannot be effective as a sale until and unless the parties have named arbitrators and they have fixed the price. That the contract is ineffective if the parties only agree to designate the experts afterwards, is true only to the extent that there is no sale. However, the contract is binding upon the parties to the extent that should either one refuse to comply with his obligation to appoint the appraiser, which is an obligation to do, he will subject himself to damages for the breach thereof.
>
> The rule announced in the *Werner* case should therefore be qualified by the foregoing. What was evidently intended was that the sale was unenforceable as such, but that the obligation to name the experts was nevertheless binding. * * *[7]

In the *Werner* case (*Louis Werner Sawmill Co.* v. *O'Shee,* 111 La. 817), the parties had left the price for timber lands to be fixed by two estimators, one to be appointed by each party with no provision for resolving disagreements between them. When the estimators could not agree, the buyer sought specific performance, alleging bad faith and requesting the court to appoint an estimator. The Louisiana court, pointing to the obvious defects of the arbitration

[7] See, also, Comment, *Certainty of Promise in the Law of Sale,* 30 Tul. L. Rev. 568, 569–570 (1956); Smith, *Civil Code and Related Subjects (Particular Contracts),* 16 La. L. Rev. 242 (1956).

scheme, held that there was no sale, and quoted with approval from the commentator Marçadé (111 La. at 822):

> "What is essential," says Marcadé, Comm. on art. 1592, C.N., "is that the parties should have bound themselves in such way that the price may be thereafter determined as a mere consequence of the consent given by them, without any new act of volition on their part. If, for example, after the parties had said that the sale was made for a price as to which they would agree thereafter, they added, or which, in case of disagreement, should be fixed by an expert to be appointed by the parties themselves or by the judge of the district, it is clear that there would be a sale, since it would no longer be within the power of the parties to prevent the fixing of the price. The result would be the same if, without expressing themselves thus explicitly, the parties had, however, manifested the idea of leaving matters to the courts, if need were, to name one or more experts; but, when nothing indicates such a consent, the fixing of the price will have to be by the expert or experts that the parties will have designated, and if one of them refuses, or dies, or is unable to make the estimation, there will be no sale, the condition upon which it depended not having materialized."

Thus, while recognizing the possibility that a valid obligation to arbitrate price can, like any other contractual obligation, be frustrated by chance circumstances, the Louisiana court has held that a contract containing an arbitration provision under which it would no longer

be within the power of either party unilaterally to prevent the fixing of the price is enforceable.[8]

Inasmuch as the fixing of the price under the arbitration provision of the Atlantic contract cannot be prevented by one of the parties, that contract fully meets the Louisiana standards of enforceability. Condition XII of the Atlantic contract provides that if the parties are unable to agree upon the price, either one can name an arbitrator by notice to the other. Within ten days, the second party is empowered to designate a second arbitrator and a third arbitrator is to be named by the first two within a second ten days. If either party fails to designate an arbitrator, the one chosen "shall arbitrate the question alone". If two arbitrators are appointed and they cannot agree on the third, the latter "* * * shall be appointed by the senior Judge of the 5th Federal Judicial Circuit upon application therefor by either of the said parties to the arbitration". See *supra*, pp. 6–7.

3. Shell's further suggestion that the instant pro-

[8] *Barber Asphalt Paving Co.* v. *St. Louis Cypress Co.*, 121 La. 152 (Pet. 17–19), is not to the contrary. In that case, the Louisiana court, in denying the validity of what is commonly known as a conditional sale, said that payment of the price could not be the condition precedent of a sale (i.e., passage of title) but rather that a sale was a condition precedent to the *obligation* to pay the price. At the same time, however, the court made it clear that parties to a contract can subject themselves to binding obligations to perform certain acts as conditions precedent to a sale. There are no conditions precedent here to the obligation to submit the price to arbitration if the parties were otherwise unable to agree.

ceedings should be held in abeyance, pending decision by the Louisiana courts in the action instituted by Shell after the decision below in this case (Pet. 21–24), is similarly lacking in merit. The ordinary practice, at least in cases which do not involve constitutional issues, is that federal courts will adjudicate state law issues arising in controversies properly before them; only in special and exceptional circumstances will resolution be suspended pending state decision. See, *e.g.*, *Propper* v. *Clark*, 337 U.S. 472, 489–492; cf. *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 160–162.

The special circumstances of this case strongly support the conclusion that its disposition should not be deferred. This controversy dates back at least to November 1954 when Shell, in filing the contract with the Commission as a rate schedule, first claimed entitlement to the 12.5-cent price in its "sample" billing statement (R. 80). In addition, Shell has been aware since March 1957 when the Commission set this matter for hearing (R. 116–117) that the Commission intended to adjudicate the controversy. Shell actively participated in these hearings, introducing witnesses and filing briefs, and when the Commission's decision was unfavorable, it was Shell which initiated the instant court proceedings by seeking review in the court below. This case has already been the subject of two decisions on the merits by the court of appeals (263 F. 2d 223, 292 F. 2d 149, Pet. App. A–1—A–7) and one by this Court (363 U.S. 263).

Despite the fact that it has pressed the alleged peculiarities of Louisiana law at every opportunity throughout these proceedings, Shell has never previously filed an action in the Louisiana courts, much less suggested suspension of the federal proceedings to await decision in Louisiana. It was only after the adverse decision below that Shell instituted an action in the Louisiana courts (which is still pending undecided) and made its present suggestion in this Court. The suggestion clearly comes much too late.

Moreover, rejection of Shell's suggestion will not "bring about the area of friction between the State and Federal judiciaries which this Court has said should be avoided" (see Pet. 22–23). Although the issues involved in the Louisiana case appear to be identical to those raised here, that case is still undetermined, while the Commission and the court of appeals have issued final decisions.* If certiorari is denied, settled doctrines would dictate that the decision in this case would be binding in the Louisiana action. *City of Tacoma* v. *Taxpayers,* 357 U.S. 320; *Stoll* v. *Gottlieb,* 305 U.S. 165; *Commissioner* v. *Sunnen,* 333 U.S. 591,

* *Leiter Minerals, Inc.* v. *United States,* 352 U.S. 220, cited by Shell (Pet. 23), involved special and exceptional circumstances inasmuch as a state interpretation of its local statute might have eliminated a constitutional question. In addition, the proceedings in both the state and federal courts were still in their preliminary stages.

597–599; *Cromwell* v. *County of Sac*, 94 U.S. 351, 352–353.[10]

[10] Should certiorari be granted, the Commission will further urge in support of the judgment below that, despite the court's contrary ruling, the issue of enforceability was in fact immaterial. Whether an agreement such as that embodied in the 1954 Atlantic price redetermination would trigger the Shell favored-nation clause depends in the first instance upon the intention of the parties to that contract. That these parties did not so intend, irrespective of the enforceability of the Atlantic contract, is apparent from this Court's earlier opinion in this case. The Court commented that the language of the favored-nation clause, "enter into a contract" was used elsewhere in the Shell contract in a context showing that these words "meant to the parties the making of a full-fledged contract containing all the terms defining the complete relationship" (363 U.S. at 273). Further noting the usual complexity and comprehensiveness of gas sales contracts, this Court found that the 1954 price redetermination embodied in the simple one-page letter specifying only a price was not "the making of a full-fledged contract"; accordingly, the Court concluded that the periodic price adjustment under the Atlantic contract did not "partake of the nature of 'enter[ing] into a contract providing for the purchase * * * of gas,' within the meaning of the language of the Shell 'favored nation' clause" (363 U.S. at 274).

Moreover, apart from this Court's prior opinion, practical considerations also indicate the immateriality of the enforceability question. It is highly unlikely that the parties to the Shell contract intended the "enter into a contract" language in the favored-nation clause to exclude only those price redeterminations made pursuant to pre-existing contracts which were technically binding and enforceable. This would conflict with the parties' obvious purpose to provide a simple, practicable standard for determining when the favored-nation clause had been triggered. Shell's interpretation would defeat this purpose by making that determination complex and difficult, involving as it would possible conflict of laws and like problems.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961